No. 3038

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

CAROLINE J. ROBINSON,

Plaintiff-in-Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors under the Will of ELIZA ROY, deceased,

Defendants-in-Error.

BRIEF FOR PLAINTIFF IN ERROR

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Error to the Supreme Court of the Territory of Hawaii.

BRIEF FOR PLAINTIFF IN ERROR

For the sake of brevity, we will refer to the plaintiff-in-error as plaintiff, and to the defendants-in-error as defendants.

I. STATEMENT OF THE CASE.

1. *Facts.*

Defendants are executors of the Will of Eliza Roy, deceased, who died on or about August 29, 1912. The plaintiff is a daughter of Eliza Roy.

Prior to November 27th, 1905, said Eliza Roy had executed and delivered to three different parties

(none of them the plaintiff) three promissory notes (two of which were secured by mortgages on land in Kona, on the Island of Hawaii), and these, for a valuable consideration, came into plaintiff's possession before said date. (Transcript, p. 2.)

On November 27th, 1905, an agreement under seal was entered into between Caroline J. Robinson, plaintiff herein, and her mother, Eliza Roy (Plaintiff's Exhibit "B," p. 117 of Record), which agreement recited the substance of the three notes heretofore mentioned, after which Caroline J. Robinson did, for the consideration of Ten Dollars ($10), thereby "acknowledge full payment and settlement of said indebtedness, principal and interest," and did thereby "release the same and cancel and discharge the said notes and mortgages." In the same sentence with these words, however, there is the following proviso: "Provided, however, that if the said Eliza Roy shall at any time hereafter mortgage or sell any of her real estate or shall incur indebtedness amounting at any one time to the sum of One Thousand Dollars ($1,000) and upwards without the consent in writing of the said Caroline J. Robinson, then and in such case this acknowledgment of payment of said indebtedness and said release and cancellation and discharge of said notes and mortgages shall be null and void and of no effect and said enumerated indebtedness and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators and assigns to the said Caroline J. Robinson, her heirs,

executors, administrators and assigns with interest thereon at the several rates aforesaid, in the same manner as though this acknowledgment of payment and release of said notes and mortgages had not been made."

After the death of Eliza Roy the plaintiff duly presented to the defendants, as executors aforesaid, her claim under and in respect of said promissory notes, demanding payment thereof. This claim having been rejected by defendants, plaintiff commenced her action in the Circuit Court for recovery of said claim, alleging in her complaint, in substance, that said notes had become due and payable to plaintiff by reason of the fact that after the execution of the agreement of November 27th, 1905, and prior to her death, "said Eliza Roy did without the consent of plaintiff, incur indebtedness amounting in the aggregate at one time to more than One Thousand Dollars." (Record, p. 19 .)

At the conclusion of the case the Court rendered a decision in which it found as a fact that Eliza Roy "did incur such indebtedness, after the execution of said agreement to an aggregate of more than One Thousand Dollars ($1,000) at a time" (and without plaintiff's consent) (Record, p. 40), but that as a matter of law such fact "did not deprive her of the benefit of the release and discharge of said indebtedness expressed in said agreement." In reaching this conclusion the trial court relied on and adopted the law as expressed in the case of *Tyson vs. Dorr*, 6 Whart. (Pa.) 255, and gave judgment in favor of

the defendants, after which plaintiff petitioned the Supreme Court of the Territory of Hawaii for a writ of error.

On June 15th, 1917, said Supreme Court (Robertson, C. J., dissenting) affirmed the judgment entered by the trial court, and plaintiff comes here by writ of error.

2. *Conflicting Views as to the Law of the Case.*

The trial court held that the condition attached to the release was void, for as was stated in the case of *Tyson vs. Dorr,* 6 Whart. (Pa.) 255, "a man cannot release a personal action as an obligation, with a condition subsequent, but the condition will be void, for a personal action once suspended, is extinguished forever."

On appeal, the three justices of the Supreme Court of the Territory of Hawaii concurred in stating that the trial judge erred in his view of the law of the case, viz:

"The ancient case of *Tyson vs. Dorr* supra, cited in support of this doctrine, has long since been discarded and the modern rule is that a release of an existing debt with conditions subsequent merely suspends the right of action thereon until such time, if ever, the event contemplated occurs." (Record, p. 129.)

But on an entirely different ground, Mr. Justice Coke, with whom Mr. Justice Quarles concurred, held that plaintiff could not prevail. "We are of opinion," he states, "that the clause in the agreement referred to, which attempted to restrain Eliza

Roy from incurring indebtedness to the amount at any one time of One Thousand Dollars or over, without the consent of plaintiff herein, constituted an abnegation of her legal rights, without benefit to plaintiff, was an unreasonable restraint of trade and is therefore void on the ground of public policy. It follows that, the condition being void, an action based upon a breach thereof could not be maintained." (Record, p. 134.)

Still another view was taken by Chief Justice Robertson, who, in a dissenting opinion, stated: "I must dissent from the * * ruling that the judgment should be affirmed on the ground that the condition subsequent was against public policy and void, and that the release, therefore, was an absolute one * * * public policy is more concerned with the enforcement of private contracts than it is with defeating them * * * Wherein an agreement made with her daughter by an elderly lady living upon her own means and upon her own premises in a country district, who does not appear to have been engaged in any business, trade or profession, upon a valuable consideration, that she will not incur indebtedness in excess of $1,000, is unreasonable, oppressive, immoral or detrimental to public interest or welfare, I humbly confess my inability to see."

The above abstract clearly shows the diversity of the several opinions rendered by men learned in the law upon the legal questions involved in this case. Wherefore, plaintiff prosecutes this appeal.

3. *General Remarks.*

An examination of the agreement (plaintiff's Exhibit "B") discloses a release of three personal obligations (two of which were secured by mortgages on land) upon condition subsequent, viz: "provided, however, *that if the said Eliza Roy shall* at any time hereafter * * * *incur indebtedness* amounting at any one time to the sum of One Thousand Dollars ($1,000) and upwards without the consent in writing of the said Caroline J. Robinson, *then and in such case*" this release to be null and void and "said enumerated indebtedness and interest thereon shall immediately become due and payable" * * *

All three justices of the Supreme Court of the Territory of Hawaii having concurred in stating that "the modern rule is that a release of an existing debt with conditions subsequent merely suspends the right of action thereon until such time, if ever, the event contemplated occurs" (Record, p. 129, and authorities there cited), we do not consider it necessary to argue in support of this ruling.

Why, then, may not plaintiff succeed in her present action?

The answer given by Justices Coke and Quarles (Chief Justice Robertson dissenting) is:

The condition attached to the release "which attempted to restrain Eliza Roy from incurring indebtedness to the amount at any one time of One Thousand Dollars or over, without the consent of plaintiff * * * was an unreasonable restraint of trade and is therefore void on the ground of public pol-

icy." (Record, p. 134.) And it is the judgment signed in pursuance of this decision which has occasioned the present appeal.

II. SPECIFICATION OF ERRORS RELIED ON.

1. *Error No. 5 in Assignment of Errors.*

"That the said Supreme Court erred in holding and deciding that the said condition and proviso in said agreement was against public policy."

2. *Error No. 12 in Assignment of Errors.*

"That the said Supreme Court erred in not holding and deciding that the defendants-in-error were barred from the defense of illegality of said agreement, by reason of their failure to raise the said defense by demurrer, answer or any other pleading or othrwise, or to give notice of the same in any way, in said Circuit Court, or to urge or raise the same in any way in said Supreme Court."

3. *Error No. 13 in Assignment of Errors.*

"That the said Supreme Court erred in holding and deciding that the defendants-in-error were not barred from the defense of illegality of said agreement by reason of their failure to give notice of their intention to rely upon the same, as required by Rule 4 of the Rules of said Circuit Court, which Rule 4 reads as follows:

" 'In personal actions, the statute of limitations shall be specially pleaded and no defendant shall be allowed to set up by way of defense to the plaintiff's claim any illegality, fraud, release, payment, infancy, coverture, or discharge under any statute relating to bankruptcy or insolvency, unless he shall, on filing his answer, give notice within his answer or at the foot thereof, of his intention to rely upon the same.' "

III. POINTS UNDER SPECIFICATION OF ERRORS.

1. The Supreme Court erred in deciding that the clause in the agreement which "attempted to restrain Eliza Roy from incurring indebtedness to the amount at any one time of One Thousand Dollars or over without the consent of plaintiff, constituted an abnegation of her legal rights, was without benefit to plaintiff, was an unreasonable restraint of trade and is therefore void on the ground of public policy." (Record, p. 134 .)

2. The Supreme Court erred in not holding and deciding that the failure of defendants to give notice of their intention to rely upon the defense of illegality as required by Rule 4 of the Circuit Court rules, barred defendants and the court from considering such defense in this cause.

IV. ARGUMENT.

1. The Supreme Court erred in deciding that the clause in the agreement which "attempted to restrain Eliza Roy from incurring indebtedness to the amount at any one time of One Thousand Dollars or over without the consent of plaintiff, constituted an abnegation of her legal rights, was without benefit to plaintiff, was an unreasonable restraint of trade and is therefore void on the ground of public policy." (Record, p. 134), for

(a) There was no restraint;

(b) The rules of law governing contracts in restraint of trade have no application in this case, for

(1) Such rules govern contracts which seek to restrain the promisor from practicing or carrying on a trade or profession, or business, or seek to create a monopoly, control prices, or prevent competition.

(2) In the case at bar Eliza Roy was not engaged in any trade, business or profession, nor does the contract tend to create a monopoly, control prices or prevent competition.

(c) But even if the rules of law governing contracts in restraint of trade have application in this case, the condition annexed to the release is a valid condition.

(d) Public policy is more concerned with the enforcement of private contracts than it is with defeating them.

(e) Public policy should favor a release of indebtedness.

(a) There was no restraint, as what was to happen in case she did incur such indebtedness was that the release ceased to be effective, and said enumerated indebtedness should immediately become due and payable. The agreement plainly states: *"if the said Eliza Roy shall* * * * *incur indebtedness* * * * *then and in such case* * * * said release * * * shall be null and void and said indebtedness * * * shall immediately become due * * * in the same manner as though this * * * release of said notes and mortgages had not been made,"—thus showing that the parties clearly contemplated that Eliza Roy could and probably would get into

debt again, and provided what should be the rights and obligations of the parties if she should do so. In that event the notes and mortgages were to be of full force and effect.

There was nothing in the agreement that did not leave Mrs. Roy at liberty to sell her land or to incur debt in excess of $1,000 without plaintiff's consent, but this she could not do and claim the benefit of the release, as the majority of the Justices of the court below have decided by holding the condition void. In other words, if it suited Mrs. Roy to avail herself of the release she could do so: if not she had merely to place plaintiff in the same position in which she stood before the agreement was signed. She was not to have the benefit of the release for the purpose of being free to get rid of her property or to get into debt again to a considerable amount when she pleased.

(b) The rules of law governing contracts in restraint of trade have no application in this case, for

(1) Such rules govern contracts which seek to restrain the promisor from practising or carrying on a trade or profession or business, or seek to create a monopoly, control prices, or prevent competition.

(2) In the case at bar Eliza Roy was not engaged in any trade, business or profession, nor does the contract tend to create a monopoly, control prices or prevent competition.

(1) Such rules govern contracts which seek to restrain the promisor from practising or carrying on a

trade or profession or business, or seek to create a monopoly, control prices, or prevent competition.

At common law the rules governing contracts in restraint of trade were only extended to such contracts as tended to restrain a man's right to exercise his trade or calling. (6 R. C. L. 785.) "By the common law contracts treated as being in restraint of trade were *limited* to contracts having for their purpose the purchase of some trade or business, as a part of which the seller agreed not to engage in the trade or business he had disposed of. But in dealing with conditions brought about by modern business methods, it has been found necessary for the public good to extend the common law prohibition against contracts in restraint of trade to cases involving more than the mere purchasing and selling of a trade or business, so as to give the courts, for the good of the public, authority to prevent, as much as possible, combinations and arrangements having for their purpose the creation of a monopoly, the control of prices and the suppression of competition." (6 R. C. L. 787.) See *Brent vs. Gay,* 149 Ky. 615, 41 L. R. A. N. S. 1034, which case involved a contract to secure control of the market on blue grass seed, and thereby control prices, which would, of course, cause a reflex injury to the public.

But this is as far as the law has gone in extending the principles of law governing restraints of trade; viz: to "prevent, as much as possible, combinations and arrangements, having for their purpose the creation of a monopoly, the control of prices, and

the suppression of competition." It is easy to understand why the law would want to control contracts tending to create "a monopoly" and to control prices, and to suppress competition, for the public has a direct vital interest in seeing that its members may buy goods at fair prices, to which end competition must be fostered. And it is not difficult to understand why the law would want to control contracts which in their tendency or necessary effect prohibit a man from carrying on his chosen trade, occupation, calling or profession, as the needs of society call for the encouragement of men to carry on their chosen form of occupation. Any restriction which curtails a man's right to practise such trade or profession beyond the point where it is of advantage to the promisee to restrain him, is only injurious to the public, and is not a real benefit to anyone.

But in order more clearly to point out the underlying difference in principle between the rules of law governing contracts in restraint of trade and the rules of law properly applicable to the facts of the case at bar, we will briefly consider the history of the rules of law governing restraints of trade and the purpose they are supposed to fulfill.

The first reported case concerning restraints of trade is that of John Dier, decided in 1415, Year Book 2, Hen. V, 5, referred to in the leading case of *Mitchell vs. Reynolds,* 1711, 1 P. Wms. 181. In the last mentioned case, Parker, C. J., said (p. 189): "But from hence I would infer: that where there may be a way found out to perform the condition,

without a breach of the law, it shall be good." And here in this opinion of Parker, C. J. (which opinion has been carefully considered in practically every decision affecting restraints of trade since 1711), we find the beginning of what the cases will show is the paramount rule now governing contracts in restraint of trade, viz. (as Chief Justice Robertson in his opinion well expresses it), that "the law is more concerned with the enforcement of private contracts than it is with defeating them." "The law is not so unreasonable as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another, as it must do if contracts with a consideration were made void." *Mitchell vs. Reynolds,* supra, p. 190. "To conclude, in all restraints of trade, where nothing more appears, the law presumes them bad, but if the circumstances are set forth, that presumption is excluded, *and the court is to judge of those circumstances, and determine accordingly, and if upon them it appears to be a just and honest contract, it ought to be maintained.*" (Id., p. 196.)

As showing the steady development of the law having to do with restraints of trade, see (1) Footnote to 1 Smith's Leading Cases, 1866 Edition, p. 619, notes by Hare and Wallace; (2) note on pp. 751-765, 92 American Decisions; (3) the case of *Hall Manufacturing Co. vs. Western Steel and Iron Works* (1915, 227 Fed. 588, L. R. A. 1916 C, 620, and note, 626).

The general rule of law governing restraints of

trade at the present time is well stated by Christiancy, C. J., in the case of *Hubbard vs. Miller,* 27 Mich. 15:

"But if, considered with reference to the *situation, business* and *objects* of the parties, and *in the light of all the surrounding circumstances with reference to which the contract was made,* the restraint contracted for appears to have been for a just and honest purpose for the protection of the legitimate interest of the party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public, the restraint will be held valid."

See also 6 R. C. L. 789.

In view of the above rule it becomes necessary to consider what rules if any have been adopted for determining whether or not a contract is reasonable as between the parties.

"No better test can be applied to the question whether a particular contract is reasonable than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." 6 R. C. L. 789.

(See also *Hubbard vs. Miller,* supra; *Horner vs.* by the other party." 6 R. C. L. 790.

A further point to be considered is whether the restraint is itself the main object of the contract, or ancillary to a main lawful purpose. For it is clear that the former would tend to create a monopoly and would be against public policy. *Hubbard vs. Miller,* supra, p. 19.

So the rule is stated:

"From the tests laid down for determining the validty of such an agreement, it seems to follow that no conventional restraint of trade can be enforced, unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." 6 R. C. L. 790.

But with respect to all the cases upon this subject which we have been able to read,—from the ancient case of *Mitchell vs. Reynolds,* 1 P. Wms. 181, to the modern case of *Hall Manufacturing Co. vs. Western Steel and Iron Works,* 1915, 1916C L. R. A. 620,—we must observe that they have reference to contracts between men or firms or corporations, wherein one party sells the goodwill of his trade, business or profession to another, and a part of the consideration of the sale is a promise on the part of the vendor that he will not carry on said trade, business or profession within certain or uncertain areas, for a certain or uncertain period of time.

And the purpose which the law has in stating that such contracts shall be no broader in their terms than are reasonably necessary for the protection of the parties themselves, is that the public has a direct vital interest in promoting trade and commerce and will not let a private contract interfere with the public good.

Summarizing, then, the rules of law which we have

found govern contracts in restraint of trade, we have the following:

"By the common law contracts treated as being in restraint of trade were *limited* to contracts having for their purpose the purchase of some *trade or business,* as a part of which the seller agreed not to engage in the trade or business he had disposed of." (6 R. C. L. 785.)

In dealing with modern business conditions "it has been been necessary for the public good *to extend* the common law prohibition against contracts in restraint of trade to cases involving more than the mere purchasing and selling of a trade or business, so as to give the courts, for the good of the public, authority to prevent, as much as possible, *combinations and arrangements having for their purpose the creation of a monopoly, the control of prices and the suppression of competition.*" (6 R. C. L. 787.)

And in dealing with *such contracts,* the courts have laid down the following general rules:

"But if, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public, the restraint will be held valid." Christiancy, C. J., in *Hubbard vs. Miller,* 27 Mich. 15.

To determine whether the restraint is reasonable as between the parties the rule is: "No better test can be applied to the question whether a particular contract is reasonable than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." 6 R. C. L. 789.

The restraint must be ancillary to the main purpose of an otherwise lawful contract. 6 R. C. L. 790.

The question then arises: What relation is there between the rules governing restraints of trade aforesaid, which were made in order that no man might be unreasonably restrained from pursuing his business, trade or profession, which the public was interested in seeing him do,—and the contract in the case at bar?

(2) In the case at bar Eliza Roy was not engaged in any trade, business or profession, nor does the contract tend to create a monopoly, control prices or prevent competition.

The answer to the question asked above is best stated in the words of Chief Justice Robertson (Record, p. 139): Eliza Roy was an "elderly lady living upon her own means and upon her own premises in a country district who does not appear to have been engaged in any business, trade or profession." She made a simple contract with her daughter, who had purchased from her creditors three of her outstanding notes, two of which were secured by mortgages. This contract contained a release of said in-

debtedness, upon condition that if Mrs. Roy incurred indebtedness in excess of $1,000 at any one time and without plaintiff's consent, the release was to be void. It is a simple contract between two women,—mother and daughter,—having no relation to business, the object of which was to relieve a mother of her mortgage debts. How such a contract,—reasonable as between the parties as of the date when it was made,—can be injurious to the public in any way, it is hard to understand.

(c) But even if the rules of law governing contracts in restraint of trade have application in this case, the condition annexed to the release is a valid condition, for

"If, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint (we cannot concede that there was any restraint in this case in view of the facts) contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid."

Hubbard vs. Miller, supra; 6 R. C. L. 789.

The contract in the case at bar "considered with reference to the situation, business and objects of the parties, and in the light of all the circumstances with reference to which the contract was made," has been ably dealt with by Chief Justice Robertson in

the concluding paragraph of his dissenting opinion. (Record, p. 139 .)

The "restraint" which (according to the view of the majority of the Supreme Court) this contract imposed upon Eliza Roy, must be deemed to have been for "a just and honest purpose," for the only purposes which the parties sought to accomplish by executing the contract were (1) to release Eliza Roy from her debts, and (2) to encourage her to live within her means thereafter.

The condition was a benefit to plaintiff, for was it not a benefit to plaintiff that her mother,—this "elderly lady (who made her mark to the agreement) living upon her own means and upon her own premises in a country district who does not appear to have been engaged in any trade or profession,"—(as Chief Justice Robertson expresses it),—should agree not to sell her land or to incur indebtedness in excess of $1,000 at any one time without consent of plaintiff, who had first acquired and then released her mortgage debts conditionally upon her doing so? So long as the agreement was observed she might expect not to be called upon again to relieve her mother's estate from debts or provide for her in case she dissipated her property. The return plaintiff got from her mother for relieving her of her debts was the agreement not to dispose of her property or to incur further debts of large amount,—and is it for others to say that this agreement, if carried out, was of no benefit to her daughter?

That the contract was reasonable as between the parties seems equally clear. Certainly it is more

than reasonable in so far as Eliza Roy is concerned, for she secured a release of indebtedness amounting to $14,490.83 and a release of her mortgages upon condition, and gave in return $10 and a promise that she would not incur further indebtedness in excess of $1,000 at a time without plaintiff's consent.

"Not specially injurious to the public," is a further test to be applied. It is not difficult to understand how a contract which precludes an artisan, or mechanic, or baker, or doctor, or lawyer from plying his trade or following his profession within a certain or uncertain area, is injurious to the public, for the public may need the services of that man in his particular calling. And yet even a contract which restrains one of such men from following his trade or profession, is a valid contract, if it conforms to the rules above mentioned. But it is difficult to understand how this simple contract between two women could possibly have any injurious influence upon, or cause any damage to, the public.

(d) "Public policy is more concerned with the enforcement of private contracts than it is with defeating them." (Robertson, C. J., Record, p. 138.)

In the ancient case of *Mitchell vs. Reynolds,* supra, we find the learned justice balancing the freedom of contract against the technical rules governing restraints of trade, after which he makes the statement:

"That where there may be a way found out to perform the condition, without a breach of the law, it shall be good." (1 p. Wms. 189.) Here, then, is evidence of the early tendency of courts to give ef-

fect where possible to a contract fairly made between competent parties, and the forerunner of what is now a well-defined presumption in American jurisprudence, viz: "The fundamental rule is that a contract will be construed, if possible, as being made for a legal rather than for an illegal purpose." (*Delaware L. and W. R. Co. vs. Kutter,* 1906, 147 Fed. 51, 62, citing *Hobbs vs. McLean,* 117 U. S. 569.)

And in *Hubbard v. Miller,* supra, Christiancy, C. J., (p. 23) said: "as parties are not lightly to be presumed to intend a violation of the law, it would still be our duty, according to the well-settled rules of law, to adopt the construction which would make it conform to the law, rather than that which would violate the law." (Citing authorities.)

We note also the case of the *Hall Manufacturing Company v. Western Steel and Iron Works,* a case decided in the United States Circuit Court of Appeals for the Seventh Circuit. (1915, 227 Fed. 588; 1916C L. R. A. 620.)

In that case appellee, in consideration of being able to sell to appellant its entire stock of diggers and augers covenanted "not again to go into the manufacture of posthole augers and diggers." (It will be noted that this covenant is without limit as to time or space.) Appellee violated the covenant and the suit resulted. Appellee then contended that the contract was against public policy;

But the court said: "*It stands,* unless it must be overthrown on account of covenantor's objections." (It will be noted that the attitude of the court is to

hold the contract good "unless it must be overthrown," etc. The presumption in favor of the validity of this covenant, which, as above noted, appears to be without limit of time or space, is clearly shown.)

"In this case," the court goes on to say, "and in all of the kind, two public interests are to be balanced against the one that is opposed to restrictive covenant. Honesty and fidelity among our business men; and the interest of everyone, and so of all, in being able to sell on the most advantageous terms whatever property he owns or has produced, whether tangible or intangible. *Unless injury to the public manifestly outweighs the public policies of honesty and of freedom of alienation, restrictive covenants should be enforced,*" and the court decided that the contract was not against public policy.

In addition to the above noted tendency of the courts to adopt where possible that construction of a contract which will result in its enforcement, there is a fundamental right of private contract, and a right to have that contract enforced, which must be carefully considered.

In the case of *Printing Co. v. Sampson* (1875, 19 L. R. Eq. 462-465), Sir George Jessel, M. R., p. 465, said:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another *public policy requires,* it is that men of full age and

competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. *Therefore you have this paramount public policy* to consider, that you are not lightly to interfere with this freedom of contract."

And the Supreme Court of the United States in the case of the *B. & O. R. Co. vs. Voigt,* 176 U. S. 498, 505, 44 Law. Ed. 565, said: "At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that *the usual and most important function of courts of justice is rather to maintain and enforce contracts,* than to enable parties thereto to escape from their obligation on the pretext of public policy, *unless it clearly appear* that they contravene public right or the public welfare." (And the court quotes with approval the opinion of Sir Gèorge Jessel in *Printing Co. v. Sampson,* supra. See also Pingrey's Extraordinary Contracts, p. 286, and cases cited; *Re Garcelon's Estate,* 32 L. R. A. 604.)

And the fact that a contract fairly made between competent parties tends in some small way to interfere with the obligor's private rights, will not affect its validity, so long as such contract is reasonable as between the parties thereto and is not specially injurious to the public, for

"Neither is it a reason against them (restraints) that they are contrary to the liberty of the subject, for a man may, by his own consent, for a valuable

consideration, part with his liberty, as in the case of a covenant not to erect a mill upon his own land."

Mitchell vs. Reynolds, supra.

"And one may agree not to do what he has a legal right to do, even though the promise may be restrictive of his personal rights."

9 Cyc. 542, citing *Waite v. Merrill,* 4 Me. 90.

In the last mentioned case (*Waite v. Merrill*) plaintiff had signed the covenant of the Society of Shakers.

One of the clauses in the covenant was that each member, when joining, should place all his private property in the hands of the trustees of the Society, who should administer it for the use of all the Society.

Another clause was, "Never to bring demand or debt against the church or each other, for any interest or services which we have bestowed to the joint interest of the church; but freely to give our time and talents, as brethren and sisters, for the mutual good one of the other, and other charitable uses, according to the order of the church."

Plaintiff, after remaining in the Society and working for the Society for twelve years, now leaves it, and sues for the value of his services for said period, alleging that the covenant was void as against public policy.

Mellen, C. J., at p. 104: "It is said that it (the covenant) is void, because it deprived the plaintiff of the constitutional power of acquiring and protecting property. The answer to this objection is, that the

covenant only changed the mode in which he chose to exercise and enjoy this right or power; he preferred that the avails of his industry should be placed in the common fund or bank of the Society, and to derive his maintenance from the daily dividends which he was sure to receive." The court further said that the covenant contemplated members joining and leaving the Society, and there was therefore no restriction of personal liberty.

Applying the reasoning of the last mentioned case to the case at bar, we find Eliza Roy using part of her freedom of contract to secure the discharge of a heavy indebtedness, and a release of her property from mortgages; she "changed the mode in which she chose to exercise this right or power" by agreeing to give up her right to incur indebtedness in excess of $1,000 at a time, in return for a discharge of said obligations, upon condition. And yet the same agreement contemplated her right to incur indebtedness over said sum if she needed or wanted to, "and there was therefore no restriction of personal liberty."

"It seems that a contract is not illegal or void, simply because private rights are interfered with by the act stipulated for; e. g., where the consideration is a breach of contract or of a private trust, the contract may be enforced, and the persons injured by its performance are left to the ordinary means of redress."

Smith's Leading Cases, Vol. 1, pt. 1, p. 623, Notes by Hare and Wallace, citing *Walker*

v. Richardson, 10 M. & W. 284, per Parke, B.; *Jackson v. Cobbin,* 8 M. & W. 797, per Vaughan, C. J.; *Rudyard's Case,* 2 Vent. 23.

"Where no express prohibition has been laid by statute, the law will permit men to contract in matters concerning their own interest as they think proper, and should be slow to impose restraints drawn from doubtful and remote considerations of public policy. When, however, a contract is of such a nature that it cannot be carried into execution, without reaching beyond the parties and exercising an injurious influence on the community at large, everyone has an interest in its suppression, and it will be pronounced void from due regard to the public welfare." Smith's Leading Cases, supra, p. 630; citing *Fuller v. Dame,* 18 Pick. 472; *Frost v. Inhabitants of Belmont,* 7 Allen 152, 162; *Gulick v. Ward,* 5 Halstead 87.

The rule as here stated, then, is: A private contract should be construed as valid and subsisting unless it must necessarily extend beyond the parties and injuriously affect the public. And how is the public affected by a contract between an elderly lady and her daughter, that said elderly lady in order to secure a release of certain obligations will not contract indebtedness in excess of $1,000 at a time without the daughter's consent; but may do so if she needs to, in which case she is not to have the benefit of the release?

The case of *Brooks v. Cooper,* 1893, 50 N. J. Eq. 761, involved the construction of a contract which the court concluded was made for the purpose of defeating a state statute.

Lippincott, J., at p. 767 said: "* * * there must be kept in view the *general rule of law* that where there is no statutory prohibition, the law will not readily pronounce an agreement invalid on the ground of public policy or convenience, but is, on the contrary, inclined to leave men free to regulate their affairs as they think proper." But the contract in this case was declared void because its purpose was to violate a state statute.

In *Collister v. Hayman,* 1905 (183 N. Y. 250, 256), plaintiff, who was a licensed ticket speculator, had bought from defendants a large quantity of theatre tickets on which was printed, "If sold on the sidewalk this ticket will be refused at the door." Plaintiff was engaged in selling said tickets "more than five feet from any point of entrance to the Knickerbocker Theatre." Defendants employed detectives who warned people about to buy tickets from plaintiff that said tickets would be refused at the door. Plaintiff therefore brought this suit for damages.

The court (p. 256) said: "This is not a case involving the liberty of the plaintiff to sell his property, for he could sell it to any person and in any place, except in the one prohibited by the contract. * * * The contract did not interfere with his absolute freedom of action *except to this limited extent* duly agreed upon in advance, while he attempts to interfere with freedom of contract on the part of defendants by restraining them from enforcing an agreement which they had made and to which he had assented." (It will be noted there is here an *attempt*

to restrain plaintiff from selling tickets "on the sidewalk" by saying said tickets would be refused at the door. And yet the contract is upheld, for it is said plaintiff had a right to sell them at any other place. Further, it does not appear on the face of the ticket, or in the decision of the court, what the benefit is to defendants that tickets be not sold on the sidewalk, —which benefit Mr. Justice Coke seemed to think in the case at bar, must necessarily appear. The New York court did not raise this point, and left the parties to the plain intent and meaning of their contract. Furthermore, in the case at bar the court, while asserting that the contract interferes with Eliza Roy's right of contract, itself interferes with her right of contract by setting aside a contract which she has made.)

In *Daley v. People B. & L. & S. Association* (1901), 178 Mass. 13, 19, plaintiff was a member and stockholder of the defendant corporation. His contract was subject to terms printed on the back, one of which was:

"Any action brought against this Association by any shareholder shall be brought * * * in the County of Ontario, State of New York."

Plaintiff sued in Massachusetts, and the court, in refusing to give plaintiff the relief asked for, said (p. 19):

"It is true * * * that our decision requires a resident of Massachusetts to go elsewhere for a remedy upon a contract made here. But objections of this sort may be made to appear more serious than

they are. Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own."

In the case of *Sheneberger vs. Union Central Life Insurance Co.* (Iowa, 1901), 55 L. R. A. 269, plaintiff's decedent had executed to the defendant a note in the sum of $5,000, payable ten years from date, and secured it by a mortgage on his farm. Three years later he obtained a loan on the land from another, and tendered to defendant a sufficient amount to satisfy its mortgage. This was refused, and plaintiff sought to cancel said mortgage. A provision in the note was:

"This note is executed upon the condition that partial payments in any amount at any time after one year will be received. * * * This condition is waived, provided the matured indebtedness has not been paid as agreed, the maker's total indebtedness is not being reduced, or provided the money tendered is borrowed in whole or part elsewhere."

Plaintiff contended that the limitation of the privilege to make payment before maturity to money not borrowed in whole or in part elsewhere was contrary to public policy, and in restraint of trade.

Ladd, J., delivering the opinion of the court, said (p. 270):

"The nature of defendant's business would seem to require that it keep the money entrusted to its care invested so as to return a fair income, and, evidently in return for its concession in the way of receiving payment at any time notwithstanding the expense of

making the loan, the decedent stipulated to make such payment only from his property and income in reduction of his debt burden, and possibly to pay a somewhat higher rate of interest. Without the limitation the duration of the loan would depend solely on the ability of the borrower to obtain cheaper money. With it the likelihood of its retention depended upon contingencies, i. e., his wish and his ability to pay from his means. In other words, *the parties chose to contract with reference to their situation, as they had a perfect right to do.* If the debtor could secure a lower rate of interest by agreeing not to exercise the option of paying before maturity save from money not borrowed, we know of no reason for depriving him of the opportunity. The note would have been valid without the option. *It is valid with an option depending on any condition not immoral or opposed to public policy.* This was neither. Affirmed."

Applying the reasoning of the court in the last mentioned case, we may say as to the case at bar:

"If the debtor" (Eliza Roy) "could secure" a release of her indebtedness "by agreeing not to exercise" her right to incur indebtedness in excess of $1,000 at a time without plaintiff's consent, "we know of no reason for depriving her of the opportunity."

(e) Public policy should favor a release of indebtedness.

The law favors any act by a creditor which will tend to extinguish debt. The fact that we have a National Bankruptcy Act supports this contention. Certainly a relative, as in our case, would have no reason or desire to give a release without a reasonable limitation or condition attached, as to release a habitual debtor is merely to allow him or her to get

into debt again, and the good efforts of the releasor have been wasted. The incentive to release, if no reasonable limitation may be attached, is absent, for without such limitation, the releasor may be called upon in a very short time to pay off new debts of the debtor.

May a generous person not say: "My mother is badly in debt. I owe her the filial duty of caring for her if it is in my power. Her lands are mortgaged and her affairs are generally badly entangled. In order to make her secure against her own poor management, and to provide for her old age, I will buy in these evidences of indebtedness and then release them, provided only, that by some means I can restrain her from getting into the same tangle again. I will give her some latitude to incur indebtedness—the amount fixed was $1,000—and I will agree that she may spend up to that amount without a breach of the contract, and if she spends over it, my notes and mortgages are to come back into full force and effect?"

So a release of the indebtedness is executed, upon condition that if the debtor contracts new debts in excess of the given amount, the old obligation is to revive. Has the debtor been imposed upon by such an arrangement? Is there anything in it unfair as to her? She gives up a right to make foolish expenditures, and is to reap a considerable benefit as long as she lives up to her contract. She can go back to the old arrangement any time she chooses, and

has the full benefit of the new arrangement as long as she cares to use it.

It is submitted that if plaintiff had said to Eliza Roy, "If you will not contract indebtedness amounting to $1,000 at a time or over without my consent for five years (or a longer term) from this date, I will then release your indebtedness," and Eliza Roy had lived up to the terms of the agreement, she could have enforced the contract at the end of the time,—but only in case she had lived up to her part of it. A contract in which A agreed with B that if B would refrain from the use of liquor for a certain period, A would pay B a fixed sum, has been upheld. (*Lindell v. Rokes,* 60 Mo. 249.) In such a case there is no restraint upon B,—he can use liquor if he chooses, but in that case he does not get the benefit of the contract. A cannot compel B to refrain from the use of liquor,—this is the test of the restraint. Neither in the case at bar could plaintiff restrain Eliza Roy from getting into debt when she chose to do so,—but if she did so, she was not to have the benefit of the release.

2. The Supreme Court erred in not holding and deciding that the failure of defendants to give notice of their intention to rely upon the defense of illegality as required by Rule 4 of the Circuit Court Rules, barred defendants and the court from considering such defense in this cause.

Said Rule 4 of the Circuit Court Rules reads as follows:

"In personal actions, the statute of limitations shall be specially pleaded, and no defendant shall be allowed to set up by way of defense to plaintiff's claim, any illegality, fraud, release, payment, infancy, coverture or discharge under any statute relating to bankruptcy or insolvency, unless he shall on filing his answer, give notice within his answer or at the foot thereof, of his intention to rely upon the same."

No notice of their intention to rely upon the defense of illegality as required by the aforesaid rule was given by defendants. Further, "the point that the contract is illegal was not raised in the trial court by demurrer, answer or otherwise, nor have the appellees urged it in this court." (Robertson, C. J., in his dissenting opinion, Record, p. 137.)

By Section 2283 of the Revised Laws of Hawaii, 1915, the judges of the several Circuit Courts of the Territory, with the approval of the Supreme Court, have power to make rules for regulating the practice and conducting the business of the Circuit Court.

Section 2370 of the Revised Laws of Hawaii, 1915, is as follows:

"Section 2370. Notice of defenses; rules. The respective courts of record shall have power to make such general and special rules, and orders, respecting notice to the opposing party, of matters intended to be given in evidence by either party to a suit, as shall be necessary to prevent surprise, and to afford an opportunity for preparation for trial."

In the Opinions of the Justices of the Supreme Court re Military Act, given in 7 Haw. 769, that the legislature had the right to delegate to the courts the

power to make rules regulating the practice of said courts, is recognized.

In *Paakuku vs. Komoikehuehu,* 3 Haw. 642, it was decided that the rules made in pursuance of statute have the force of law.

In *Pahia vs. Maguil,* 11 Haw. 530, 533, the Supreme Court of Hawaii enforced the rule. "The defendant not having pleaded these defenses * * * could not avail himself of the defence of * * * illegality in the contract." (See also *Sherman vs. Harrison,* 7 Haw. 663; *Piipiilani vs. Houghtailing,* 11 Haw. 100; *Kapela vs. Gilliland,* 22 Haw. 655 (1915).)

As the rules in force when the action was brought were approved by the Supreme Court of the Territory of Hawaii on the 12th day of Jauary, 1914, long after the case of *Pahia vs. Maguil* was decided, the necessity for the rule and the justice of the decision, were recognized.

The object of the rule, in the words of Section 2370 of the Revised Laws of Hawaii, 1915, was "To prevent surprise and to afford an opportunity for preparation for trial."

It is not enough that the illegality in the contract appears upon the face of the complaint: the rule requires that if the defendant desires to set up illegality as a defense he must give notice "of his intention to rely upon the same."

It was therefore error for the court in the case at bar to consider such defense, for

(1) The court overruled *Pahia vs. Maguil* without apparently being aware of the fact;

(2) Defendants have not raised the point in any form;

(3) Plaintiff has had no opportunity of showing any evidence in avoidance of what the majority of the court thought was the illegality of the instrument.

(1) The court overruled *Pahia vs. Maguil* without apparently being aware of the fact.

In none of the opinions was the case of *Pahia vs. Maguil* mentioned nor indirectly referred to, nor the suggestion made that the Justices had any intention of overruling the decision in that case.

However, "a decision in conflict with prior decisions and not supported by reason or authority will not be adhered to where it is not probable that property rights will be seriously affected."

11 Cyc. 745, note 77, and the cases there cited.

In a number of cases it has been decided that a "decision rendered by a divided court is not generally considered obligatory as a precedent."

Hanifen vs. Armitage, 117 Fed. 845.

A fortiori, a decision by a divided court, should not overrule a decision of a full court.

(2) Defendants have not raised the point in any form.

(3) Plaintiff has had no opportunity of showing any evidence in avoidance of what the majority of

the court thought was the illegality of the instrument.

Chief Jusice Robertson deals with these two points so well in his dissenting opinion that we shall content ourselves with subjoining an extract from it:

"The point that the contract is illegal was not raised in the trial court by demurrer, answer or otherwise, nor have the appellees urged it in this court. But it is said that the condition of the release is in and of itself contrary to public policy, and that it is the duty of this court upon its own motion to decline to enforce it. The principal opinion seems to concede, however, that if the provision as to incurring indebtedness in excess of $1,000 was a 'benefit' to the plaintiff, or if she might 'suffer by the breach' of the contract, or if it was a 'reasonable restraint,' or if the restraint was not 'larger than what was required for the necessary protection' of the obligee, it would not render the condition invalid. Yet, by affirming the judgment of the circuit court, this court precludes the plaintiff from the opportunity of showing, if she could, that the restraint was reasonable, or that the condition was a benefit to her and that she would suffer by its breach. She is practically denied her day in court on that matter. The case of *Notley v. Notley,* cited in the principal opinion, was an equity appeal, the entire case was before this court upon the facts as well as the law, and the conclusion of this court was based upon evidence contained in the record. This case seems to be decided

upon a lack of evidence upon a point which was not agitated in the trial court."

CONCLUSION.

For the reasons hereinbefore set forth, it is respectfully submitted that the judgment heretofore entered on behalf of the defendants-in-error should be reversed.

Respectfully submitted,

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